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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 373

SYLVANIA ELECTRIC PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is reported at 358 F. 2d 591. The Board's decision and order (J.A. 51–68)[1] are reported at 154 NLRB No. 149.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1966, and a petition for rehearing was denied on April 21, 1966. The petition for a writ of certiorari was filed on July 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the joint appendix filed in the court of appeals.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 4a–6a of the appendix to the petition.

QUESTION PRESENTED

Whether, in the circumstances of this case, the employer violated his statutory obligation to bargain in good faith by refusing, during the course of contract negotiations, to disclose to the union the estimated costs of proposed improvements in non-contributory pension and group insurance programs—data which were relevant to matters under negotiation.

STATEMENT

A. *The Board's findings of fact.* Under its collective bargaining agreement with the Union,[2] which was to expire on September 30, 1964, the Company bore the entire cost of employee group insurance and pension programs (J.A. 54; 3, 6–8). On June 11, 1964, prior to new contract negotiations, the Union requested certain cost data on the insurance and pension programs, which it stated were "necessary for intelligent bargaining" (J.A. 55; 85). In response, the Company furnished data concerning past and current programs, showing, *inter alia*, actuarial assumptions and costs of the pension plan, and claim and premium expenses of the insurance plan (J.A. 55; 86–153).

[2] Local 352, International Union of Electrical Radio and Machine Workers, AFL–CIO, which represented the production and maintenance workers at the Company's Batavia, New York plant.

On July 24, at the first bargaining session, the parties exchanged contract proposals, the Union proposing certain improvements in the pension and group insurance programs (J.A. 56; 8). At the next meeting, on August 12, the Company made a written proposal which included changes in the pension and group insurance programs (J.A. 56; 11, 155–172). Following a detailed explanation of this proposal by the Company's chief negotiator, Joseph Gill, the Union's chief negotiator asked for a cost breakdown of the Company's offer in terms of cents per hour (J.A. 56; 11–12). Conceding that the Company considered costs when bargaining about such benefits, Gill refused to provide the requested data, stating that the Company was not bargaining about its costs but only about the level of employee benefits (J.A. 56; 12). After further meetings, at which the Union presented its contract proposals, Gill commented that the Union's economic demands, if accepted, would entail substantial cost to the Company and would prevent the Company from meeting its competition (J.A. 57; 12–14). The Union negotiator replied that the Union needed information in order to bargain intelligently and that it had no desire to place the Company in a noncompetitive position (J.A. 57–58; 14–15).

When, at a meeting on September 23, a Union representative repeated the request for a cost breakdown of the Company's offer, Gill again replied that the Company was not bargaining about cost but only about the level of benefits (J.A. 58; 32). Other Union officials then stated that the Company had

attached a cost to its "package", which the Union was entitled to, and needed to, know (J.A. 58; 33). When Gill persisted in his refusal, a Union representative asked for a comparison of the value of the economic benefits offered the Company's Buffalo plant with the value of those offered in Batavia, "because if there was a difference he would like to be able to spread this over other benefits" (J.A. 58; 33–34).[3] Gill replied that he would consider it, but pointed out that there were other improvements in the "package" and that he "wouldn't like to improve the package thirty per cent" (J.A. 58; 33).[4]

The Union representative then referred specifically to the pension plan, stating that he believed that the cost attached to it was not more than half a cent (J.A. 58; 33–34). Gill, conceding that the Company had put a cost figure on the pension proposal, argued that, considering all the improvements, it was a "good package" (J.A. 58–59; 33–34). The Union's chief steward disagreed and noted his preference for the existing insurance program, which he felt was more favorable to the Batavia employees than the one being offered (J.A. 59; 34). He added that, if there were any additional costs, the Company should add

[3] The Company's Buffalo plant had an older and more senior complement of employees than the Batavia plant. Accordingly, the improved insurance and pension program appeared to provide more immediate benefits to the Buffalo employees than to the Batavia employees (J.A. 19–20, 45).

[4] The "thirty per cent" was apparently Gill's estimate of the costs the Union's demands would add to the total economic package.

them to the wage offer and forget about providing new insurance (J.A. 59; 34). Finally, the steward pointed out that the negotiators could not "sell" a contract to the Union membership when they did not understand the offer themselves. After a short recess, Gill stated that the Company's position had not changed, and the meeting adjourned (J.A. 59; 34).

Later that day, the Union's president sent Gill the following letter (J.A. 59; 173):

> Today in negotiations you repeatedly refused to give this organization requested information as to the cost in cents per hour of each item of the Company's offer for a new collective bargaining agreement.
>
> This letter is directed to you as a follow-up on the oral request made on September 23, 1964.
>
> Your cooperation in this matter is needed so we can reach a fair * * * agreement.

In reply, the Company denied the Union's request, stating (J.A. 59–60; 173–174):

> * * * With respect to your most recent request for additional cost data, which preceded your calling a recess in negotiations, such request related primarily to your desire to have the cost estimate of the Company in its proposed noncontributory improvements in such things as Pensions, Insurance and Vacations.
>
> As you know our Pension, Insurance and Vacation programs, including the proposed improvements therein, are being provided without diminishment, regardless of the fluctuation in costs thereof during the term of a new Agreement. As a result, our compliance

> with your request is not necessary in order to proceed with negotiations or to reach a fair and equitable new Agreement, and, thus, we re-affirm our position not to supply such information. Your making our compliance with the Union request a prerequisite to a continuation of negotiations is seriously impeding such a settlement.

The Union filed an unfair labor practice charge with the Board, alleging that the Company had unlawfully refused to furnish the Union "information necessary for collective bargaining purposes as to the cost of the Employer's offer as to pensions, insurance, and vacations" (J.A. 60; 79–80), and a complaint issued on this charge.[5]

B. *The Board's conclusions and order.* The Board found that the information sought by the Union regarding the cost of the Company's proposed improvements in the insurance and pension programs was relevant to the Union's bargaining function. Accordingly, it held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish that information and ordered the Company to provide the requested data (J.A. 65–67).

C. *The decision of the court of appeals.* The court of appeals held that, in the circumstances of this case, information about the cost of the Company's proposed improvements in the pension and insurance plans was "so necessary to effective negotiations"

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[5] While the complaint was pending before the Board, the parties entered into a collective bargaining agreement based on the Company's original offer (J.A. 17–19).

that the Company's refusal to produce it was inconsistent with its bargaining obligation (Pet. App. 4a). The court thus sustained the Board's findings and enforced its order (*ibid.*).

ARGUMENT

The decision of the court of appeals, which turns on the particular facts of this case, is correct and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. This Court has recognized that an employer violates Section 8(a)(5) and (1) of the Act if he refuses, during the course of contract negotiations, to furnish the employees' bargaining representative with wage and related information reasonably necessary to enable it to perform its representative function intelligently. *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9).[6] The Board and the court of appeals correctly applied this principle in the present case. Under the circumstances revealed in the present record, the Board and the

[6] Accord: *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58, 60–61 (C.A. 1); *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied, 349 U.S. 905; *National Labor Relations Board* v. *The Item Co.*, 220 F. 2d 956, 958 (C.A. 5), certiorari denied, 350 U.S. 836; *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641, 645 (C.A. 7).

court properly concluded that the lack of information respecting the cost of the Company's proposed improvements in the insurance and pension plans significantly impaired the Union's ability to engage in meaningful bargaining about "wages, hours, and other terms and conditions of employment" (Section 8(d)).

When the Company offered the Union a package that included improvements in the existing welfare programs, the Union requested a cost breakdown. Although the Company acknowledged that it took cost into consideration in making its offer and opposed the Union's suggested changes on the ground that they would be too costly and would render the Company noncompetitive, the Company refused the Union's requests for information on the sole ground that it was bargaining about benefits and not costs. As a result, the Union had to guess about the money value which the Company attached to the welfare improvements—the guesses ranging from half-a-cent to thirty cents an hour (J.A. 20–21, 33–34). Moreover, the Union was prevented from effectively exploring the possibility of exchanging the cost of the proposed welfare benefits for increased wages or other benefits which the Union considered more desirable for the Batavia employees. In these circumstances, the Board was warranted in concluding that the information requested by the Union "was so necessary to effective negotiation that withholding it without good reason was inconsistent with the duty to 'exert every reasonable effort to make and main-

tain agreements'" (Pet. App. 4a, quoting from *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152).

2. There is no substance to petitioner's contention (Pet. 13–19) that the decision of the court below obliterates the distinction between mandatory and non-mandatory subjects of bargaining. See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342. Assuming *arguendo* that a non-contributory employee insurance and pension program is in the latter category, *Borg-Warner* requires only that, if the Union proposed such a program, it could not compel the Company to bargain about it. Nothing in that decision suggests that, where the employer himself makes a proposal which encompasses a non-mandatory bargaining subject and the union undertakes to negotiate about it, the union is precluded from obtaining information on the cost of the non-mandatory component of the proposal, where, as here, there is a close relation between the latter and the remaining components, which are clearly within the area of mandatory bargaining. See *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 70–71 (C.A. 3), where the union was held entitled to information respecting the duties and functions of employees outside the bargaining unit because such information was relevant to a determination whether the unit had been improperly diluted.

This point explains and justifies the difference in result between the decision below and the decision

of the same court in *Sylvania Electric Products, Inc.* v. *National Labor Relations Board*, 291 F. 2d 128 (C.A. 1), certiorari denied, 368 U.S. 926, involving another plant of the same employer. In that case, the court held that the union was not entitled to information regarding the costs of a non-contributory group insurance plan. But, as the court explained here, the union there simply requested "welfare plan cost information for the purpose of bargaining about whether [the employer] is receiving the best coverage for his money," a matter which the employer is not obliged to discuss with the union (Pet. App. 4a). Unlike the present situation, the union there did not show that the information was needed "in order better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay, matters as to which the employer must bargain * * *" (Pet. App. 4a).[7]

[7] *United Fire Proof Warehouse Co.* v. *National Labor Relations Board*, 356 F. 2d 494 (C.A. 7) (Pet. 15–16), is also distinguishable. There, the employer rejected a union demand for a wage increase on the ground that a portion of his operation was losing money. When the union insisted upon substantiation of this claim, the employer furnished information relating to the portion of the business that was losing money, but declined to permit the union to inspect financial records regarding his entire operation. The court held that, as the employer had never contended that his entire operation was losing money but that only a portion was unprofitable, there was no basis for concluding that financial data relating to the entire operation was relevant to the bargaining negotiations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

WARREN M. DAVISON,
Attorney,
National Labor Relations Board.

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